

HONORABLE JUDGE BENJAMIN H. SETTLE
MAGISTRATE JUDGE J. RICHARD CREATURA

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

WILLIAM MARTIN,

Plaintiff,

v.

JEFF UTTECHT, et al.,

Defendants.

NO. 3:18-cv-05929-BHS-JRC

DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

**NOTE ON MOTION
CALENDAR: April 3, 2020**

Defendants JEFFREY UTTECHT, STEPHEN BOLINGER, JOSHUA CRUGER, JERRY WONDERS, and SHAWNA NISSEN, through their attorneys, ROBERT W. FERGUSON, Attorney General, and MARKO L. PAVELA, Assistant Attorney General, move the court for an order granting Defendants' Motion for Summary Judgment. This motion is filed pursuant to Fed. R. Civ. P. 56 and is supported by the following Memorandum.

I. STATEMENT OF FACTS

Jerry Wonders and Shawna Nissen are two Correctional Officers periodically assigned to Gate 35 at the Coyote Ridge Corrections Center (CRCC). Declaration of Jerry Wonders (Wonders Decl.) ¶¶ 3–4; Declaration of Shawn Nissen (Nissen Decl.) ¶ 3. While assigned to Gate 35, officers work in teams to conduct pat searches, to mitigate transfer of contraband, and to monitor adherence to prison rules regarding inmate attire,

proper display of ID, and the like. Wonders Decl. ¶ 3. Through years of experience, both Wonders and Nissen have become proficient in conducting pat searches and dealing with contraband; Wonders has even taught incoming officers on the subject. Wonders Decl. ¶¶ 2, 8–12; Nissen Decl. ¶¶ 2, 5. These searches are routine and done to help maintain safety and security within the prison. Wonders Decl. ¶ 6; Nissen Decl. ¶ 3; Declaration of Javier Lagunas (Lagunas Decl.) ¶ 4.

Plaintiff Martin¹ is an inmate formerly housed at CRCC, who would frequently approach Gate 35 with prohibited contraband, visible to the officers assigned there. Wonders Decl. ¶ 3; Nissen Decl. ¶ 4; Lagunas Decl. ¶ 4. This led to Martin being occasionally searched, to determine whether Martin was concealing any other items. Nissen Decl. ¶ 5; Lagunas Decl. ¶ 4. Martin became argumentative while being searched, often claiming that work supervisors gave Martin permission to possess prohibited items, which they cannot do. Wonders Decl. ¶ 13; Declaration of Marko Pavela (Pavela Decl.) Exhibit (Ex.) 1, at 36–37. But even despite Martin’s argumentative nature, officers still sought to give Martin space to self-correct, sought advice from supervisors on how to deal with Martin, and even tried pat searching Martin less frequently to de-escalate their encounters. Wonders Decl. ¶ 13; Nissen Decl. ¶¶ 5–6. Officers even chose to deal with Martin’s rule violations at the lowest level, informally, rather than infracting Martin. Wonders Decl. ¶¶ 10–11.

During August 2018, Martin began using the Department’s inmate grievance system to accuse Correctional Officer Jerry Wonders of verbal sexual harassment during these pat searches. Pavela Decl. Ex. 2. The Department takes such allegations seriously, and facilities such as CRCC initiate an investigation under the Prison Rape Elimination Act (PREA) upon receipt of a complaint alleging staff on offender misconduct.

¹ Martin, since transferred from CRCC to the Airway Heights Corrections Center in Airway Heights, WA (Dkt. No. 25, at 2), has self-identified as transgender. But Defendants are unaware of Martin’s preferred pronouns. Defendants therefore refer to Martin by name, or use the pronouns they/them/theirs, to avoid misgendering Martin.

1 Declaration of Stephen Bolinger (Bolinger Decl.) ¶¶ 4–6. CRCC Superintendent
 2 Jeffrey Uttecht and CRCC Human Resources are notified, and the Superintendent assigns an
 3 investigator to the matter. *Id.* ¶ 6. The formal investigation is defined by process, and consists
 4 of fact finding only. *Id.* ¶ 7. The results of the investigation are then sent to the
 5 Superintendent, who makes conclusions about whether a violation can be substantiated, and
 6 how the facility should proceed. *Id.* This first investigation was assigned case number
 7 18-18091. *Id.* ¶ 9.

8 When Martin continued to file similar grievances; DOC appended the investigation
 9 file with these additional similar complaints. Bolinger Decl. ¶ 9. Ultimately, after staff
 10 conducted interviews with Martin, Wonders, and three other officers who were present at the
 11 pat searches which Martin identified, Superintendent Jeffrey Uttecht determined Martin’s
 12 allegations of verbal harassment were unfounded. *Id.* ¶¶ 9–10, Exs. 1, 2. Uttecht’s finding
 13 was based on his review of twenty-four exhibits, which included statements from three
 14 officers in good standing who witnessed the encounters between Wonders and Martin and
 15 denied that any inappropriate comments were made. Bolinger Decl. Exs. 1, 2.

16 Martin continued filing grievances, escalating the allegations within to encompass
 17 physical harassment (or “groping”) as well. Pavela Decl. Exs. 3–6. The Department initiated
 18 a second PREA investigation, identified by case number 18-18162. Bolinger
 19 Decl. ¶¶ 11–12. The coordinating PREA Specialist also checked in with Martin personally
 20 during this time. *Id.* ¶ 13. Staff investigated Martin’s complaints through interviews with
 21 Martin, Wonders, another officer present during the pat searches where Martin claimed this
 22 groping occurred, and another inmate as well. *Id.* ¶ 12. Importantly, staff reviewed
 23 surveillance video of the pat searches in question as well. *Id.* After review of the
 24 investigation, Superintendent Uttecht again determined Martin’s allegations to be
 25 unfounded. *Id.* In making this determination, Uttecht reviewed twenty-one exhibits,
 26

1 including the video, which demonstrated that the “pat searches conducted by officer Wonders
2 on offender Martin [were] standard routine searches.” Bolinger Decl. Exs. 3, 4.

3 This second PREA investigation led to issue of a prison rules infraction for Martin,
4 for violation of Wash. Admin. Code § 137-25-030 (549) – “Providing false or misleading
5 information during any stage of an investigation of sexual misconduct, as defined in
6 department policy.” Bolinger Decl. ¶ 14. Typically, Department staff are reluctant to issue
7 such infractions because they do not want incarcerated individuals to hesitate in reporting
8 PREA complaints or incidents that made them uncomfortable. *Id.* However, in egregious
9 situations such as this, where video made it clear that Wonders’ pat search of Martin was not
10 at all inappropriate, and where it is clear that an inmate sought to make use of PREA to harm
11 or harass staff, an infraction is a necessary and appropriate consequence. *Id.*; Declaration of
12 Joshua Cruger (Cruger Decl.) ¶ 7, Exs. 1, 3–4. Such false claims not only affect staff
13 negatively, but also undermine the Department’s work to enforce PREA and maintain safe
14 and secure prisons. Bolinger Decl. ¶ 14.

15 Martin continued accusing staff of misconduct during the pendency of the infraction
16 process, and Martin’s accusations grew in scope to include Correctional Officer
17 Shawna Nissen as well. Bolinger Decl. ¶¶ 15–16. Staff initiated a third PREA investigation,
18 18-18362, and this investigation included interviews with Martin, Nissen, and another officer
19 present during a pat search where Martin alleged that Nissen had threatened to retaliate
20 against them. *Id.* ¶ 16. Superintendent Uttecht reviewed the investigation, including nine
21 exhibits, and determined once again that Martin’s allegations were unfounded.
22 Bolinger Decl. Exs. 5, 6.

23 Martin filed the operative Second Amended Complaint on April 5, 2019. Dkt. No. 11.
24 Through this complaint, Martin seeks to perpetuate the accusations of misconduct against
25 Wonders and Nissen, including those which were thoroughly disproven by review of
26

1 surveillance video, and to now target additional CRCC staff with false accusations as well.
 2 Dkt. No. 11. Defendants now move for dismissal of Martin's claims against them.

3 II. ISSUES PRESENTED

4 1. Whether the Western District of Washington is a proper venue for Plaintiff's
 5 lawsuit?

6 2. Whether Defendants are entitled to Summary Judgment on Plaintiff's
 7 constitutional claims against them?

8 3. Whether Defendants are entitled to Qualified Immunity?

9 III. ARGUMENT

10 A. The Western District of Washington is an Improper Venue for Plaintiff's Lawsuit

11 Statutes provide guidance on the appropriate venue for civil actions brought in the
 12 district courts of the United States. 28 U.S.C. § 1391(a). Generally, a civil action may be
 13 brought in the judicial district in which any defendant resides, or in the judicial district in
 14 which a substantial part of the events giving rise to the claim occurred. 28 U.S.C. § 1391(b).
 15 Fed. R. Civ. P. 12(b)(3) allows for dismissal of lawsuits brought in an improper venue;
 16 28 U.S.C. § 1406 states that lawsuits brought in an improper venue can be dismissed, or
 17 transferred to an appropriate venue.

18 Here, all of the Defendants work at the Coyote Ridge Corrections Center (CRCC), in
 19 Connell, WA. Dkt. No. 11, at 5. Plaintiff was also housed at CRCC when the events described
 20 in Plaintiff's lawsuit are alleged to have occurred. Dkt. No. 11, at 4. Although Plaintiff was
 21 housed at the Monroe Correctional Complex, in Monroe, WA, when Plaintiff filed this
 22 lawsuit, Dkt. No. 11, at 2, Plaintiff is now housed at the Airway Heights Corrections Center,
 23 in Airway Heights, WA. Accordingly, Defendants asserted improper venue as an affirmative
 24 defense in their Answer to Plaintiff's lawsuit. Dkt. No. 23, at 3.

25 In sum, all the Defendants are in the Eastern District of Washington, the Plaintiff is
 26 in the Eastern District of Washington, and these events are alleged to have occurred in the

1 Eastern District of Washington. The Western District of Washington is therefore an
 2 inappropriate venue for this lawsuit. As a threshold matter, this Court should first dismiss,
 3 or transfer Plaintiff's lawsuit to the Eastern District of Washington, on these grounds.
 4 28 U.S.C. § 1406.

5 **B. Defendants are Entitled to Summary Judgment on Plaintiff's Constitutional**
 6 **Claims, Whether in this District or the Eastern District**

7 Summary judgment should be granted where the pleadings, discovery conducted, and
 8 affidavits, if any, show that there is no genuine issue as to any material fact and that the
 9 moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*,
 10 477 U.S. 317, 322 (1986); *see* Fed. R. Civ. P. 56. The party seeking summary judgment must
 11 show that no genuine issue of material fact exists and that they are entitled to judgment as a
 12 matter of law by showing that there is an absence of evidence to support the non-moving
 13 party's case. *Celotex*, 477 U.S. at 325. To determine if summary judgment is appropriate, the
 14 Court must consider whether a particular fact is material and whether there is a genuine
 15 dispute as to that fact left to be resolved. Factual disputes that do not affect the outcome of
 16 the suit under governing law will not be considered. *Id.* Where there is a complete failure of
 17 proof concerning an essential element of the non-moving party's case, all other facts are
 18 rendered immaterial, and the moving party is entitled to judgment as a matter of law. *Celotex*,
 19 477 U.S. at 324; *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990).

20 Once the moving party has carried its burden, the party opposing the motion must do
 21 more than simply show that there is some metaphysical doubt as to the material facts.
 22 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The Ninth
 23 Circuit has expressly stated that "[n]o longer can it be argued that any disagreement about a
 24 material issue of fact precludes the use of summary judgment." *California Architectural*
 25 *Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert.*
 26 *denied*, 484 U.S. 1006 (1988). Further, genuine issues of material fact are not raised by

conclusory or speculative allegations; the purpose of summary judgment is not to replace conclusory allegations in pleading form with conclusory allegations in an affidavit. *Lujan*, 497 U.S. at 888; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (“[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” (citation omitted)).

1. Surveillance video demonstrates that the “groping” alleged by Martin did not occur; Martin can no longer sustain claims under the Eighth Amendment

Martin’s claims, as they relate to the Eighth Amendment, appear to center around a series of pat searches, which Martin claims were intended to harass Martin because of Martin’s sexual orientation or gender identity. Dkt. No. 11, at 4. The behavior Martin *alleges* is troubling, and would have no place in a prison.

Articulating the legal standard for such claims, the Ninth Circuit recently held:

[A] prisoner presents a viable Eighth Amendment claim where he or she proves that a prison staff member, acting under color of law and without legitimate penological justification, touched the prisoner in a sexual manner or otherwise engaged in sexual conduct for the staff member’s own sexual gratification, or for the purpose of humiliating, degrading, or demeaning the prisoner. This definition recognizes that there are occasions when legitimate penological objectives within a prison setting require invasive searches. It also accounts for the significant deference courts owe to prison staff, who work in challenging institutional settings with unique security concerns. In a case... where the allegation is that a guard’s conduct began as an invasive procedure that served a legitimate penological purpose, the prisoner must show that the guard’s conduct exceeded the scope of what was required to satisfy whatever institutional concern justified the initiation of the procedure. Such a showing will satisfy the objective and subjective components of an Eighth Amendment claim.

Bearchild v. Cobban, 947 F.3d 1130, 1144–45 (9th Cir. 2020).

a. Martin was never “groped” by Wonders

Here, surveillance video demonstrates that these pat searches were professional and appropriate, and did not occur as Martin claims. Bolinger Decl. ¶ 14; Cruger Decl. ¶ 7, Exs. 3–4. This evidence demonstrates that no “lingering or groping” occurred, but quite the opposite—that “if any scrutiny could be made, [these pat searches] were not as thorough as they

1 might have been.” Cruger Decl. Ex. 1. Evidence further demonstrates that these pat searches
 2 were not “without legitimate penological justification” or for Wonders’ “sexual gratification, or
 3 for the purpose of humiliating, degrading, or demeaning” Martin. *See Bearchild*,
 4 947 F.3d at 1144. The brief and professional pat searches occurred only because Martin
 5 consistently presented to officers while flaunting contraband. Wonders Decl. ¶¶ 5–6; Nissen
 6 Decl. ¶¶ 4–5; Lagunas Decl. ¶ 4. Jerry Wonders never “groped” Martin during a pat search.

7 **b. Alleged insults cannot sustain an Eighth Amendment claim on their**
 8 **own**

9 Martin’s allegations of groping aside, Martin is left alleging only tasteless and offensive
 10 comments made by Officer Wonders. First, these comments, like the groping alleged, simply did
 11 not occur. Wonders Decl. ¶¶ 16–18. Each time Wonders and Martin interacted, other officers
 12 were present. *Id.* ¶ 4. According to these officers, who witnessed Wonders and Martin’s
 13 interactions, not only did Wonders not make these comments, but such comments would have
 14 been completely out of Wonders’ character. Nissen Decl. ¶ 10; Lagunas Decl. ¶¶ 5–6. Even if
 15 the Court may not engage in credibility determinations while evaluating a motion for summary
 16 judgment, Martin’s claims cannot survive here while supported by only “uncorroborated and
 17 self-serving testimony.” *Manley v. Rowley*, 847 F.3d 705, 710–11 (9th Cir. 2017) (citing
 18 *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002)).² When Wonders did
 19 search Martin, these searches were done professionally.

20 But even if the Court accepts Martin’s allegations regarding name calling as true, while
 21 hurtful, unprofessional, and without a place in a prison, Wonders Decl. ¶ 17, the mere comments
 22 alleged by Martin would not rise to the level of a constitutional violation on their own. Martin
 23 has neither claimed that name calling alone can invoke constitutional protection, nor can Martin.
 24 In *Somers v Thurman*, the Ninth Circuit found no Eighth Amendment violation where female

25 _____
 26 ² While Manley’s claims did survive summary judgment on appeal, they were supported by prison medical
 records and video. *Manley*, 847 F.3d at 709.

1 prison staff joked, gawked, and pointed at naked male inmates showering. *Somers v. Thurman*,
 2 109 F.3d 614, 624 (9th Cir. 1997) *cert. denied*, 522 U.S. 852 (1997). The Ninth Circuit reasoned
 3 that the shower viewing did not involve any physical contact and that “[t]o hold that gawking,
 4 pointing, and joking violates the prohibition against cruel and unusual punishment would
 5 trivialize the objective component of the Eighth Amendment test and render it absurd.”
 6 *Id.* at 624. The Ninth Circuit also noted that “the exchange of verbal insults between inmates and
 7 guards is a constant, daily ritual observed in this nation’s prisons” which is not condoned, but
 8 does not violate the Eighth Amendment. *Id.* at 622.

9 Even since *Somers*, the Ninth Circuit has consistently held that the Eighth Amendment’s
 10 protections do not extend to mere verbal sexual harassment. *See Austin v. Terhune*, 367 F.3d
 11 1167, 1171 (9th Cir. 2004) (finding that an incident involving a guard that exposed himself to
 12 an inmate but never physically touched the inmate was not sufficiently serious to constitute an
 13 Eighth Amendment violation); *Blueford v. Prunty*, 108 F.3d 251, 256 (9th Cir. 1997) (affirming
 14 summary judgment in favor of prison officials where “the only arguably sexually harassing
 15 conduct . . . was verbal”); *Blacher v. Johnson*, 517 Fed. Appx. 564 (9th Cir. 2013) (finding that
 16 Eighth Amendment’s protections did not extend to mere verbal sexual harassment) (citation
 17 omitted).

18 The groping alleged by Martin did not occur, and Martin cannot create an issue of
 19 material fact to survive summary judgment on these claims in the face of video evidence to the
 20 contrary. Even if the Court accepts his allegations of name calling as true, these are not enough
 21 to sustain his Eighth Amendment claims against *any* Defendant here. All the Defendants are
 22 therefore entitled to dismissal of Martin’s Eighth Amendment claims against them.

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1 **2. Martin cannot show that they were discriminated against because of their**
 2 **membership in a protected class, and so Martin’s Fourteenth Amendment**
 3 **claims fail**

4 Martin also alleges discrimination, in violation of the Fourteenth Amendment.
 5 Dkt. No. 11, at 4. Martin’s claims, which do not make any mention of “due process,” appear to
 6 implicate only the Equal Protection clause of that Amendment.

7 The Equal Protection Clause requires the State to treat all similarly situated people
 8 equally. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). To prevail on
 9 an equal protection claim brought under § 1983, a plaintiff must allege facts plausibly showing
 10 that “ ‘the defendants acted with an intent or purpose to discriminate against [them] based upon
 11 membership in a protected class.’ ” *See Thornton v. City of St. Helens*, 425 F.3d 1158, 1166
 12 (9th Cir. 2005) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001)); *see also*
 13 *Reese v. Jefferson School Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000) (Plaintiff claiming an
 14 equal protection violation must show that they were discriminated against because of their
 15 membership in a protected class and that this discrimination was intentional).

16 This standard is a high bar that cannot be met by allegations alone. The requisite
 17 “‘[d]iscriminatory purpose’ . . . implies more than intent as volition or intent as awareness of
 18 consequences. It implies that the decision maker . . . selected or reaffirmed a particular course of
 19 action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable
 20 group.” *Navarro v. Block*, 72 F.3d 712, 716 n.5 (9th Cir. 1995) (quoting *Personnel Adm’r of*
 21 *Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). “Indeed, showing that different persons are treated
 22 differently is not enough, without more, to show a denial of equal protection.” *Griffin v. Cty.*
 23 *Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 230 (1964).

24 Further, in the prison context, equal protection rights are “judged by a standard of
 25 reasonableness—specifically, whether the actions of prison officials are ‘reasonably related to
 26 legitimate penological interests.’ ” *Walker v. Gomez*, 370 F.3d 969, 974 (9th Cir. 2004) (quoting
 27 *Turner v. Safley*, 482 U.S. 78, 89 (1987)). And for equal protection purposes, prisoners are not

1 a suspect class, nor are they entitled to identical treatment or resources as other inmates simply
 2 because they are all inmates. *Hartmann v. California Dep't of Corr. & Rehab.*, 707 F.3d 1114,
 3 1123 (9th Cir. 2013).

4 If Martin's Fourteenth Amendment claim is that Martin was searched because of their
 5 status as a transgender person, Martin cannot show the requisite discriminatory purpose. The
 6 purpose of the pat searches was to detect contraband, including potential weapons, and promote
 7 prison safety. Martin frequently and openly violated the Department's policies regarding
 8 contraband, thus necessitating pat searches of Martin's person. Wonders Decl. ¶¶ 5–7; Nissen
 9 Decl. ¶¶ 4–5; Lagunas Decl. ¶ 4. Incarcerated individuals are prohibited from possessing a
 10 variety of seemingly innocuous items, such as pens, during prisons movement, because of the
 11 danger they present in the prison context, and particularly when large numbers of individuals are
 12 moving and interacting. These movements are when Martin and Wonders would interact, and
 13 when Wonders was responsible to help maintain the safety and security of the incarcerated
 14 population and staff. Wonders Decl. ¶ 6; Nissen Decl. ¶ 4. In fact, Officers Wonders and Nissen
 15 are required by the nature of their job to search inmates carrying contraband during these
 16 movements. Wonders Decl. ¶ 3; Nissen Decl. ¶ 3.

17 Further, Wonders and Nissen deny Martin's account of these events, and there is no
 18 evidence sufficient to convince a reasonable trier of fact that these necessary searches were
 19 instead some sort of pretext to discriminate against a transgender inmate, nor can Martin show
 20 that any similarly situated individuals were treated differently. Wonders Decl. ¶¶ 16–18; Nissen
 21 Decl. ¶¶ 7–10; Lagunas Decl. ¶ 5. *See Furnace v. Sullivan*, 705 F.3d 1021, 1030–31
 22 (9th Cir. 2013) (Intentional discrimination requires an individual to show that they were treated
 23 differently from individuals who were similarly situated to them); *See Bingham v. City of*
 24 *Manhattan Beach*, 341 F.3d 939, 948–49 (9th Cir. 2003) (Plaintiff must “produce evidence
 25 sufficient to permit a reasonable trier of fact to find by a preponderance of the evidence that
 26 [the challenged action was motivated by discriminatory intent]”). *See also e.g., Barnes v. Arden*

1 *Mayfair, Inc.*, 759 F.2d 676, 681 (9th Cir. 1985) (courts are only required to draw reasonable
 2 inferences). Martin has not shown, and cannot show, that Officers Wonders and Nissen
 3 discriminated against Martin because of Martin's membership in a protected class, or treated
 4 Martin differently than any other inmate carrying visible contraband, so these defendants are
 5 entitled to dismissal of Martin's Fourteenth Amendment claims against them.

6 Similarly, if Bolinger, Cruger, or Uttecht did anything to hold Martin accountable for
 7 making false accusations, that was not because of Martin's membership in a protected class, but
 8 because video evidence made it clear to them that Martin's accusations were false and intended
 9 to harm a staff member. Bolinger Decl. ¶ 14; Cruger Decl. ¶ 7, Exs. 1, 3–4. Martin cannot
 10 overcome this by merely claiming otherwise, and cannot demonstrate that Martin was treated
 11 differently from anyone else similarly situated, and so Bolinger, Cruger, and Uttecht are entitled
 12 to dismissal of these claims against them.

13 **3. Martin's First Amendment claims are conclusory and bare and should be**
 14 **dismissed**

15 While Martin alleges violations of the First Amendment, Dkt. No. 11, at 4, exactly how
 16 the First Amendment is implicated by Martin's claims remains unclear to the Defendants.
 17 Defendants are aware, however, that Martin is entitled to a lesser standard of pleading as a *pro*
 18 *se* litigant. *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982); *Eldridge*
 19 *v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987). So Defendants first assert that Martin's First
 20 Amendment claims are too bare and conclusory to continue, and then out of an abundance of
 21 caution strain to interpret Martin's claims as allegations of some form of retaliation against
 22 Martin on account of Martin's status as a transgender individual.

23 But even under relaxed standards of pleading, such a retaliation claim still requires five
 24 basic elements:

- 25 (1) An assertion that a state actor took some adverse action against an
 26 inmate (2) because of (3) that prisoner's protected conduct, and that such action

(4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.

Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009) (quoting *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005)).

Whether the “adverse action” alleged is being selected for a pat search, or being subject to prison discipline, Martin cannot sustain a claim that any protected conduct was chilled. Pat searches are a normal fact of life in prisons and would not chill a reasonable inmate from engaging in protected conduct. *See Rhodes*, 408 F.3d at 568. Pat searches of inmates seen with contraband are also not “adverse actions,” but routine, necessary responses by prison staff, to mitigate such contraband and maintain institutional safety and order. Wonders Decl. ¶¶ 3–6; Nissen Decl. of Nissen ¶ 3. Even if pat searches or following processes regarding prison discipline were “adverse actions,” neither carrying contraband, nor providing false information to investigators, are protected conduct under the First Amendment. And again, no reasonable inmate of ordinary firmness would be chilled in their expression simply for being pat searched after being observed carrying contraband. Finally, the Department has legitimate penological interests in both conducting appropriate pat searches of inmates observed with contraband and appropriately subjecting inmates to prison discipline for rule violations. Allowing inmates to lie to investigators during sexual misconduct investigations would not only affect staff negatively, but also undermine the Department's work in eliminating such misconduct. Bolinger Decl. ¶ 14. This very Court has recognized these legitimate penological interests by rejecting claims of First Amendment violations from other inmates infracted for providing false information through a PREA complaint. *Payment v. Roiko*, C14-5633 BHS, 2015 WL 4724626, at *6 (Western District of WA, Aug. 10, 2015) (unpublished).

Martin must do more than merely name the First Amendment and expect this lawsuit to continue under that Amendment. These claims are too bare, and should be dismissed. But even providing Martin every benefit so far as the standards of pleading, none of these Defendants did

1 anything to Martin because of Martin's protected conduct, but instead engaged in normal safety
 2 and policy responses to Martin's actions because Martin was either carrying contraband or
 3 caught lying to investigators. Dismissal of Martin's First Amendment claims is therefore
 4 appropriate here.

5 **C. These Defendants Are Entitled to Qualified Immunity from Martin's § 1983 Claims**

6 To prevail on a claim for damages, Martin must defeat the defense of qualified immunity.
 7 *Hamby v. Hammond*, 821 F.3d 1085, 1090 (9th Cir. 2016). To defeat a claim of qualified
 8 immunity, Martin must show, "first, [that they] suffered a deprivation of a constitutional or
 9 statutory right; and second [that such] right was clearly established at the time of the alleged
 10 misconduct." *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (per curiam). The Court may decide
 11 which step of the analysis to undertake first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).
 12 Failing at either one will preclude Martin from recovering damages. *Id.*

13 To be clearly established, "a right must be sufficiently clear that *every* reasonable official
 14 would have understood that *what he is doing* violates that right." *Taylor*, 135 S. Ct. at 2044
 15 (emphasis added) (quoting *Reichle v. Howards*, 566 U.S. 658 (2012)). Although a plaintiff need
 16 not find "a case directly on point, . . . existing precedent must have placed the . . . constitutional
 17 question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). That is, existing
 18 precedent must have "placed beyond debate the unconstitutionality of" the officials' actions, as
 19 those actions unfolded in the specific context of the case at hand. *Taylor*, 135 S. Ct. at 2044. A
 20 plaintiff must prove that "precedent on the books" at the time the officials acted "would have
 21 made clear to [them] that [their actions] violated the Constitution." *Id.* at 2045. In addition, when
 22 the Circuit Courts of Appeal are divided on an issue of law that is central to a cause of action
 23 alleged, qualified immunity applies. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866–67 (2017) (citing
 24 *Wilson v. Layne*, 526 U.S. 603, 618 (1999) ("noting that it would be 'unfair' to subject officers
 25 to damages liability when even 'judges . . . disagree' "). Finally, the clearly established inquiry
 26

1 must not be at too high of a level of generality. *See e.g. City & Cty. of San Francisco v. Sheehan*,
 2 135 S. Ct. 1765, 1775–76, (2015).

3 Defendants first reassert that no constitutional violation occurred. Martin was pat
 4 searched because Martin frequently and openly carried contraband, and because pat searches are
 5 a normal part of prison and occur hundreds of times a day to keep prisons safe. Martin was
 6 subject to prison discipline for fabricating claims about groping, and only after video evidence
 7 made it clear that Martin’s claims were demonstrably false. Neither Wonders nor Cruger targeted
 8 Martin with slurs, nor did any of these defendants ever seek to ridicule, harm, or harass Martin
 9 because of Martin’s gender identity.

10 But even if this Court were to find that some of Martin’s claims to the contrary should
 11 survive summary judgment, qualified immunity would still be appropriate here because no
 12 “precedent on the books” at the time the Defendants acted “would have made clear to [them]
 13 that [their actions] violated the Constitution.” *Taylor*, 135 S. Ct. at 2045. Under this prong of the
 14 inquiry, the question is not whether Martin’s surviving claims would be viable under *Bearchild*,
 15 but instead under the case law that existed at the time of Defendants’ actions. *See Taylor*,
 16 135 S. Ct. at 2045.

17 Martin has the burden of proving that the specific right claimed was clearly established
 18 at the time of the alleged misconduct. *Davis v. Scherer*, 468 U.S. 183, 191 (1984). Until this
 19 burden is met, the Defendants are presumed to be immune from suit and are entitled to dismissal.
 20 *ACLU of Maryland v. Wicomico Cty.*, 999 F.2d 780, 785 (4th Cir. 1993).

21 **1. The Defendants did not violate any “clearly established” Eighth Amendment**
 22 **case law**

23 Searches intended to harass may violate the Eighth Amendment. *See Hudson v. Palmer*,
 24 468 U.S. 517, 530 (1984). Prison officials’ knowledge of the risk of psychological trauma from
 25 body searches of female inmates by male guards, for example, can make such searches a
 26 violation of the Eighth Amendment. *See Jordan v. Gardner*, 986 F.2d 1521, 1526–30

(9th Cir. 1993) (en banc). And even other Courts of Appeals have found that “frequent retaliatory cell searches” and allegations evidencing a “pattern of calculated harassment” can constitute a claim under the Eighth Amendment, *Scher v. Engelke*, 943 F.2d 921, 924 (8th Cir. 1991), and that a “prisoner states a claim under the Eighth Amendment when he plausibly alleges that [repetitive and redundant strip searches, and issue of a see through jumpsuit, were] motivated by a desire to harass or humiliate rather than by a legitimate justification, such as the need for order and security in prisons.” *King v. McCarty*, 781 F.3d 889, 897 (7th Cir. 2015).

But the Ninth Circuit has also held that allegations that an officer entered an inmate’s cell and approached the inmate while he was on the toilet, then rubbed his thigh against the inmate’s thigh, “began smiling in a sexual [manner], and left the cell laughing,” were not sufficient to support a violation of the Eighth Amendment. *Watison v. Carter*, 668 F.3d 1108, 1112-13 (9th Cir. 2012); *see also Berryhill v. Schriro*, 137 F.3d 1073, 1076 (8th Cir. 1998) (“there is no evidence that [Plaintiff] suffered anything more than a brief unwanted touch on his buttocks. We bear in mind that not “ ‘every malevolent touch by a prison guard [or civilian prison worker] gives rise to a federal cause of action.’ ” (citations omitted); *see also Vigliotto v. Terry*, 873 F.2d 1201 (9th Cir. 1989) (generalized allegations of harassing searches are insufficient to survive summary judgment).

Similarly, the Ninth Circuit has also stated that to “hold that gawking, pointing, and joking violates the prohibition against cruel and unusual punishment would trivialize the objective component of the Eighth Amendment test and render it absurd.” *Somers v. Thurman*, 109 F.3d 614, 624 (9th Cir. 1997). And again, the Ninth Circuit has thus far held that the Eighth Amendment’s protections do not extend to mere verbal sexual harassment. *See Austin*, 367 F.3d at 1171 (finding that an incident involving a guard that exposed himself to an inmate but never physically touched the inmate was not sufficiently serious to constitute an Eighth Amendment violation); *Blueford*, 108 F.3d at 256 (affirming summary judgment in favor of prison officials where “the only arguably sexually harassing conduct . . . was verbal”);

1 *Blacher*, 517 Fed. Appx. 564 (finding that Eighth Amendment's protections did not extend to
2 mere verbal sexual harassment).

3 Instances where the Ninth Circuit found that an inmate plaintiff *did* plead enough to
4 sustain a sexual harassment claim further illustrate the type of behavior that would be
5 constitutionally impermissible, and that derogatory name calling alone is not unconstitutional
6 beyond debate so that Martin can prevail against a defense of qualified immunity. *Bearchild*, for
7 example, alleged a five minute pat search involving “rubbing, stroking, squeezing, and groping
8 in intimate areas” followed by a guard glaring down on an inmate’s penis and then mocking the
9 inmate. *Bearchild*, 947 F.3d at 1135. In *Schwenk v. Hartford*, an inmate plead:

10 [A guard] winking, performing explicit actions imitating oral sex, making
11 obscene and threatening comments, watching [her] in the shower while ‘grinding’
12 his hand on his crotch area, and repeatedly demanding that [she] engage in sexual
13 acts with him. [She] further alleged that [the guard] later propositioned [the
14 inmate] for sex in exchange for “girl stuff” and then forcibly grabbed her buttocks
when she declined. [She] tried to avoid [the guard] after that encounter, but [the
guard] subsequently entered her cell, exposed himself, demanded oral sex, and
then pinned [her] against the bars of her cell and “began grinding his exposed
penis into her buttocks” when she refused to comply.

15 *Bearchild*, 947 F.3d at 1142 (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1193–94 (9th Cir.
16 2000)).

17 Similarly, *Wood v. Beauclair*, 692 F.3d 1041 (9th Cir. 2012), involved “aggressive pat
18 searches in front of other inmates on a number of occasions,” and on multiple occasions entering
19 that inmate’s cell and forcibly grabbing his penis. *Bearchild*, 947 F.3d at 1142 (quoting *Wood v.*
20 *Beauclair*, 692 F.3d at 1044–45). Thus, the case law on the books when Defendants took their
21 actions, and even current case law, does not establish that allegations of only verbal insults can
22 implicate the Eighth Amendment.

23 Martin’s claims of groping should not survive summary judgment where there is video
24 evidence demonstrating that his allegations are false. Martin’s remaining allegations, even
25 viewed in the light most favorable to Martin, would still amount to no more than hearing verbal
26 derogatory slurs during a pat search. Had this occurred it would be hurtful, and inappropriate,

1 but a few instances of name calling during brief, professional, and appropriate pat searches fall
2 squarely among the cases in which Courts have declined to find a violation of the Eighth
3 Amendment.

4 Accordingly, Martin's allegations of name calling by either Wonders or Cruger, even if
5 they were true, simply do not rise to the level of harm that any caselaw on the books at the time
6 of Defendants' actions had held to be an Eighth Amendment violation.

7 **2. The Defendants did not violate any "clearly established" First or Fourteenth**
8 **Amendment case law**

9 If Martin's Fourteenth Amendment claim is that Martin was discriminated against and
10 subjected to pat searches on account of being transgender, Martin's practice of consistently
11 presenting to Gate 35 with contraband, and not Martin's gender, made it necessary for these
12 searches to occur. Martin's gender does not grant Martin immunity from prison rules regarding
13 contraband, nor would any case law suggest otherwise. Even if this Court did allow Martin's
14 Fourteenth Amendment claims to survive summary judgment, the Defendants would still be
15 entitled to qualified immunity on these claims, because they only did what any reasonable prison
16 official would do – conduct occasional pat searches on an inmate frequently observed with
17 contraband. The Ninth Circuit has not yet held that inmates have any right to be free from brief,
18 clothed, body searches, even cross-gender searches. *Byrd v. Maricopa Cty. Sheriff's Dep't*,
19 629 F.3d 1135, 1142 (9th Cir. 2011) (en banc); *Grummett v. Rushen*, 779 F.2d 491, 495 (9th Cir.
20 1985).³ Thus, there is no clearly established right not to be subject to such searches, particularly
21 when the person in question is carrying visible contraband.

22 Similarly, Bolinger, Cruger, or Uttecht, for their role in the issue of an infraction, did not
23 violate any clearly established constitutional precedent, but instead sought to hold Martin
24

25 ³ While more invasive searches, such as strip searches or those involving "squeezing and kneading" of the
26 crotch area can become problematic under the Eighth Amendment when done by members of the opposite sex, *See Jordan v. Gardner*, 986 F.2d 1521, 1524–25 (9th Cir. 1993) (en banc), video evidence confirms that no such prolonged contact occurred here. Cruger Decl. ¶ 7, Exs. 3–4.

1 accountable after review of video evidence demonstrated Martin's claims were objective false
 2 and misleading. Case law from this very Court supports the premise that inmates can be infracted
 3 for providing false information through a PREA complaint. *Payment*, 2015 WL 4724626, at *6.
 4 Nor would Martin's false claims be entitled to any First Amendment protection, generally. *See*
 5 *Nat'l Labor Relations Bd. v. Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing*
 6 *Ironworkers Union, Local 433*, 891 F.3d 1182, 1187 (9th Cir. 2018) ("The First Amendment
 7 does not afford unbridled protection to . . . harassing and intimidating conduct."). As such,
 8 Defendants violated no clearly established right and the case law at the time of their conduct
 9 would have indicated to them that their conduct was constitutional.

10 All the Defendants are therefore entitled to qualified immunity, even if some of Martin's
 11 claims do survive summary judgment.

12 IV. CONCLUSION

13 Defendants respectfully request that this Court grant their motion for summary
 14 judgment and dismiss Martin's claims against them, with prejudice.

15 RESPECTFULLY SUBMITTED this 6th day of March, 2020.

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